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NOORALINA MOHD SHAH & ANOR v. PP

HIGH COURT MALAYA, KUALA LUMPUR
NORDIN HASSAN JC
[CRIMINAL APPLICATION NO: 44-104-10-2015]
22 FEBRUARY 2016

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COMPANY LAW: *Insider trading – Offence of – Charges under s. 89E(2)(a) and punishable under s. 89E(4) of Securities Industry Act 1983 ('SIA') – Whether s. 89E(4) of SIA infringes art. 8(1) of Federal Constitution – Whether penal provision of s. 89E(4) of SIA exists side by side with ss. 90 and 90A of SIA – Civil liability – Whether discriminatory in nature – Guideline for classification – Whether reasonable and permissible*

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CRIMINAL LAW: *Statutory offences – Securities Industry Act 1983 – Charges under s. 89E(2)(a) and punishable under s. 89E(4) of Securities Industry Act 1983 ('SIA') – Whether penal provision of s. 89E(4) of SIA exists side by side with ss. 90 and 90A of SIA – Civil liability – Whether discriminatory in nature – Guideline for classification – Whether reasonable and permissible*

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WORDS & PHRASES: *'information' – Securities Industry Act 1983 – Section 89 – Meaning of – Statutory definition includes 'matters relating to the future' – Whether plain and unambiguous – Whether s. 89 infringes art. 5(1) of Federal Constitution*

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The first applicant was charged in the Sessions Court with seven charges for abetting the second applicant in committing the offence of insider trading, an offence under s. 89E(2)(a) of the Securities Industry Act 1983 ('SIA') read

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together with s. 122C and punishable under s. 89E(4) of the SIA. The second applicant was charged with seven charges of insider trading under s. 89E(2)(a) and punishable under s. 89E(4) of the SIA. The applicants subsequently filed an application to refer two constitutional questions to the High Court under s. 30(1) of the Courts of Judicature Act 1964 ('CJA'), *inter alia*: (i) whether s. 89E(4) of the SIA infringes art. 8(1) of the Federal

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Constitution ('Constitution') when s. 89E(4) (which is a penal provision) and ss. 90, 90A(5) and (6) of the SIA (which create civil liability) exist side by side in the SIA and there is no guideline as to the class of cases in which either procedure is to be resorted to; and (ii) whether the definition of 'information' in s. 89 of the SIA which includes 'matters relating to the

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future' infringes art. 5(1) of the Constitution because the statutory definition of 'information' is vague and uncertain. The application was allowed by the Sessions Court Judge and thus, the record of proceedings was transmitted to the High Court.

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Held (answering both constitutional questions in the negative):

(1) Sections 89E(4), 90 and 90A applies to all persons who have contravened the provisions that relate to insider trading under the SIA. All the persons can be taken criminal action under s. 89E(4) or civil action under ss. 90 and 90A. As the impugned sections applies to

everybody that contravenes the law, it is not discriminatory in nature. Further, the criminal proceedings under s. 89E(4) is exercisable by the Public Prosecutor whereas civil action under ss. 90 and 90A is exercisable by the Security Commission ('SC'). Thus, there are two different parties exercising two different powers with two different considerations and in this context, it was untenable to say that the powers or procedure in ss. 89E(4), 90 and 90A exist side by side. (paras 17-19)

(2) Even if the powers or procedures in the said provisions exist side by side, that in itself does not affect the validity of the law in question. The said law is still valid if there is guideline in class of cases in which either procedure to be resorted to and the law in question contains provision for appeal. The guideline for the classification may be found in the law itself or may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances. As such, it is not a requirement of the law to have a written guideline or policy. (paras 21 & 22)

(3) Under s. 90A of the SIA, the important guideline before the SC decides as to whether to take any civil action against a person in breach of the said law is to consider whether it is for the public interest to take the action to recover the sums as stated in s. 90A(5) or (6) of the SIA. The guideline can also be inferred from the objectives of the impugned law which, among others, is to recover the profit made by any person committing the offence of insider trading. Apart from that, there was a right to appeal in relation to actions taken under ss. 89E(4), 90 and 90A of the SIA as provided under ss. 26, 28, 50 and 67 of the CJA. In the circumstances, the existence of two procedures side by side did not affect the validity of the law in question. (paras 23-26)

(4) Under the doctrine of classification, classification is permissible if it is founded on an intelligible *differentia* and the *differentia* has a rational relation to the object sought to be achieved by the law in question. Therefore, even if the law in question can be considered as discriminatory, it is still a good law if it is based on reasonable or permissible classification. Further, the classification based on difference in the circumstances of the case did not infringe art. 8(1) of the Constitution. There was clear nexus between the classification and the object of the impugned law in the case herein and therefore the classification was reasonable and permissible. The applicants had failed to show any bias consideration by the authority or arbitrary, artificial or evasive classification in implementing the law. The first question was therefore answered in the negative. (paras 27, 30, 33 & 38)

(5) Section 89 is relevant to establish the offence of insider trading under s. 89E(4) of the SIA wherein the section sets out the categories of 'information' in paras. (a) to (f) for the purpose of determining as to

whether a person is an 'insider' under s. 89E(1). It was not for the court to speculate what is 'matters relating to the future' in para. (f). The wordings is plain and unambiguous. The question as to whether the words 'matters relating to the future' was too wide in its application and uncertain were matters to be debated in the Parliament and not for the court to determine. The duty of the court is to implement the law. Therefore, it had not been established that s. 89 infringes art. 5(1) of the Constitution and the second question was answered in the negative. (paras 42, 43, 46 & 47)

Case(s) referred to:

Bird Dominic Jude v. PP [2014] 4 CLJ 133 FC ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC ***(foll)***
Duport Steels Ltd v. Sirs [1980] 1 All ER 529 ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***
M Chhagganlal v. Greater Bombay Municipality AIR 1974 SC 2009 ***(refd)***
Nadarajah v. PP [2000] 4 CLJ 634 HC ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
PP v. Harmenderpall Singh Jagara Singh [2007] 2 CLJ 577 CA ***(refd)***
PP v. Khong Teng Khen & Anor [1976] 1 LNS 100 FC ***(refd)***
PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1980] 1 LNS 223 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 26, 28, 30(1), 50, 67
Federal Constitution, arts. 5(1), 8(1)
Securities Industry Act 1983, ss. 89E(2)(a), (4), 90, 90A(5), (6), 122C

For the applicants - Alex Tan (Mohammad Radhi Azizan with him); M/s Chong Loong Men
For the respondent - Shanti Geofrey; DPP

Reported by S Barathi

JUDGMENT

Nordin Hassan JC:

Introduction

[1] The first applicant, Nooralina binti Mohd Shah was charged in the Sessions Court with seven charges for abetting the second applicant in committing the offence of insider trading, which is an offence under s. 89E(2)(a) of the Securities Industry Act 1983 ('SIA') read together with s. 122C of the 'SIA' and punishable under s. 89E(4) of the same Act.

[2] The second applicant, Amran bin Awaluddin was charged with seven charges of insider trading under s. 89E(2)(a) of the SIA and punishable under s. 89E(4) of the same Act.

[3] On 14 September 2015, the applicants filed an application in the Kuala Lumpur Sessions Court to refer two constitutional questions to the High Court under s. 30(1) of the Courts of Judicature Act 1964 ('CJA').

[4] The said application was allowed by the Sessions Court Judge and the record of proceedings was transmitted to this court.

[5] The two constitutional questions are as follows:

(i) first question

Whether s. 89E(4) of the SIA infringes art. 8(1) of the Federal Constitution when s. 89E(4) of the SIA (which is a penal provision) and s. 90, and s. 90A(5) and (6) of the SIA (which create civil liability) exist side by side in SIA and there is no guideline in SIA as to the class of cases in which either procedure is to be resorted to.

(ii) second question

Whether the definition of 'information' in s. 89 of the SIA infringes art. 5(1) of the Federal Constitution because the statutory definition of 'information' is vague and uncertain.

The Applicants' Contentions

[6] Briefly, the applicants' contentions are as follows:

(i) as regard the first question, it was submitted that there are two procedures available in the SIA against any person who commits an offence of insider trading which contravenes s. 89E(2) of the SIA. The action which can be taken is either to commence criminal proceedings under s. 89E(4) or to commence civil proceedings under ss. 90 or 90A of the SIA.

It was argued that s. 89E(4) discriminates against those who have contravened s. 89E(2) of the SIA and prosecuted under s. 89E(4) against those who have contravened s. 89E(2) but was taken civil action under ss. 90 or 90A of the SIA. Therefore s. 89E(4) of the SIA is contrary to art. 8(1) of the Federal Constitution because it is more drastic and prejudicial as compared to ss. 90 and 90A of the SIA.

(ii) as to the second question, the applicants contended that the definition of information under s. 89 of the SIA which has relation with s. 89E and which includes 'matters relating to the future' is vague and uncertain. Therefore, it was argued that s. 89 of the SIA is contrary to art. 5(1) of the Federal Constitution.

The Respondent's Contention

[7] The respondent submitted that the criminal proceedings under s. 89E(4) and civil proceedings under ss. 90 and 90A are not mutually exclusive in that the ability to take one action does not preclude the other.

[8] It was further argued that even if there are two procedures existing side by side and the executive may choose either procedure, it does not affect the validity of the law.

[9] Apart from that, the respondent submitted that the criminal proceedings under s. 89E(4) is exercisable by the Public Prosecutor whereas civil action under ss. 90 and 90A are exercisable by the Security Commission. As such both procedures under s. 89E(4) and ss. 90 and 90A cannot be said to exist side by side as the powers are exercised by different parties.

[10] Therefore the respondent submitted that s. 89E(4) of the SIA is a valid law and does not contravened s. 8(1) of the Federal Constitution.

[11] As to the second question, the respondent argued that the definition of information under s. 89 should be read with the term 'insider' under s. 89E(1) and there is sufficient specificity in the law to determine when a person is an insider for the purposes of the law. It was also submitted that s. 89 of the SIA is not contrary to art. 5(1) of the Federal Constitution.

Decision Of The Court

[12] In this application, the applicants are challenging the constitutionality of ss. 89E(4) and 89 of the SIA.

[13] In this regard, it is trite law that there is strong presumption of constitutional validity of a particular law and the burden of proof is on the party seeking to establish the contrary. As stated by Justice Mohammad Dzaiddin in the case of *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116:

> It should be borne in mind that there is a strong presumption of the constitutional validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise.

(see also *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105; [2002] 3 MLJ 72 and *PP v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566).

First Question

[14] In relation to the first question referred to this court with regard to the issue of equality before the law under art. 8(1) of the Federal Constitution, it is instructive to refer to the Federal Court case of *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155 FC; which has succinctly laid down the pertinent principles of law which are as follows:

(i) The equality provision is not absolute. It does not mean that all laws must apply uniformly to all persons in all circumstances everywhere.

(ii) The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.

(iii) The prohibition of unequal treatment applies not only to the legislature but also to the executive – this is seen from the use of the words 'public authority' in clause (4) and 'practice' in clause (5)(b) of Article 8.

(iv) The prohibition applies to both substantive and procedural law.

(v) Article 8 itself envisages that there may be lawful discrimination based on classification – thus Muslims as opposed to non-Muslims (para. (b) of clause (5) of Article 8); aborigines as opposed to others (para. (c)); residents in a particular State as opposed to residents elsewhere (para. (d)); and Malays and natives of Borneo as opposed to others who are not (Article 153).

(vi) In India the first question they ask is, is there classification? If there is and subject to other conditions, they uphold the law. If there is no classification, they strike it down.

With respect we would agree with the Solicitor-General's submission that the first question we should as is, is the law discriminatory, and that the answer then be – if the law is not discriminatory, if for instance it obviously applies to everybody, it is good law, but if it is discriminatory, then because the prohibition of unequal treatment is not absolute but is either expressly allowed by the constitution or is allowed by judicial interpretation we have to ask the further question, is it allowed? If it is, the law is good, and if it is not, the law is void.

[15] The application of law in relation to the issue of equality before the law under art. 8(1) was explained further in the case of *PP v. Khong Teng Khen & Anor* [1976] 1 LNS 100; [1976] 2 MLJ 166 as follows:

The principle underlying Article 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons …for the purpose of legislation', *Kedar Nath v. State of West Bengal*.

[16] Having laid down the relevant principles of law and before I consider the issue as to whether s. 89E(4) of the SIA is discriminatory or otherwise, following the guidelines in *Datuk Harus*'s case *(supra)*, for ease of reference and to put matter in perspective, ss. 89E(4), 90 and 90A are set out below which read as follows:

(i) section 89E

89E. Prohibited conduct of person in possession of inside information.

(1) A person is an *'insider'* if that person:

(a) possesses information that is not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of securities; and

A (b) knows or ought reasonably to know that the information is not generally available.

(2) An insider shall not, whether as principle or agent, in respect of any securities to which information in subsection (1) relates:

B (a) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or

(b) procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

C (3) Where trading in the securities to which the information in subsection (1) relates is permitted on a stock market of a stock exchange, the insider shall not, directly or indirectly, communicate the information referred to in subsection (1), or cause such information to be communicated, to another person, if the insider knows, or ought reasonably to know, that the other person would or would tent to:

D (a) acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates; or

(b) procure a third person to acquire, dispose of or the enter into an agreement with a view to the acquisition or disposal of, any securities to which the information in subsection (1) relates.

E (4) A person who contravenes or fails to comply with subsection (2) or (3) commits an offence and is liable on conviction to a fine of not less than RM1 million and to imprisonment for a term not exceeding 10 years.

F (ii) Section 90

90. Civil remedies.

(1) Where it appears to the Commission that any person has contravened section 84, 85, 86, 87, 87A, 88 or 89E, the Commission G may institute civil proceedings in the Court against that person, whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proved in a prosecution.

(2) A proceeding under subsection (1) or under section 88A or 90A may H be begun at any time within 12 years from:

(a) the date on which the cause of action accrued; or

(b) the date on which the Commission or the plaintiff, as the case may be, discovered the contravention,

I Whichever is the later.

(iii) Section 90A

90A. Recovery of loss or damages.

(1) A person who suffers loss or damages by reason of, or by relying on, the conduct of another person who has contravened section 89E may recover the amount of loss or damages by instituting civil proceedings against the other person, whether or not the other person has been charged with an offence in respect of the contravention or not a contravention has been proved in a prosecution.

(2) In subsection (1), 'loss or damages' includes an unrealised loss or gain, as the case may be, in the price or value of securities of a corporation being the difference between:

(a) the price or value of securities in a transaction in connection with which the person first-mentioned in subsection (1) claims to have suffered loss or damages; and

(b) the price which would have been the likely price of the securities in the transaction, or the value which it is likely that such securities would have had at the time of that transaction, if the contravention had not occurred.

(3) Where an insider acquired or agreed to acquire, or procured another person to acquire or agree to acquire, securities from a person (the 'seller') who did not possess the information, in contravention of subsection 89E(2), the seller may, by civil action against the insider or any other person involved in the contravention, recover, as a loss or damages suffered by the seller, the difference between:

(a) the price at which the securities were acquired, or agreed to be acquired, by the insider or other person, from the seller; and

(b) the price at which the securities would have been likely to have been acquired at the time of the acquisition or agreement, as the case may be, referred to in paragraph (a) if the information had been generally available.

(4) Where an insider acquired of or agreed to disposed of, or procured another person to dispose of or agree to dispose of, securities to a person (the 'buyer') who did not possess the information, in contravention of subsection 89E(2), the buyer may, by civil action against the insider or any other person involved in the contravention, recover, as a loss or damages suffered by the buyer, the difference between:

(a) the price at which the securities were disposed, or agreed to be disposed of, by the insider or other person, to the buyer; and

(b) the price at which they would have been likely to have been disposed of at the time of the disposal or agreement, as the case may be, referred to in paragraph (a) if the information had been generally available.

(5) Where an insider acquired of or agreed to acquire, or procured another person to acquire or agree to acquire, securities, in contravention of subsection 89E(2), and such securities were permitted to be traded on a stock market of a stock exchange, then, whether or not be insider or any other person involved in the contravention has been charged with an offence in respect of the contravention or whether or not the contravention has been proved in a prosecution, the Commission may, if it considers that it is in the public interest to do so by civil action against the insider or any other person involved in the contravention:

(a) recover an amount equal to three times the amount being the difference between the price at which the securities were acquired, or agreed to be acquired, by the insider or other person, and the price at which they would have been likely to have been acquired at the time of the acquisition or agreement, as the case may be, if the information had been generally available; and

(b) claim civil penalty in such amount as the Court considers appropriate having regard to the seriousness of the contravention, being an amount not more than RM1 million.

(6) Where an insider disposed of or agreed to disposed of, or procured another person to dispose of or agree to dispose of, securities, in contravention of subsection 89E(2), and such securities were permitted to be traded on a stock exchange, then whether or not the insider or any other person involved in the contravention has been charged with an offence in respect of the contravention or whether or not the contravention has been proved in the prosecution, the Commission may, if it considers that it is in the public interest to do so, by civil action against the insider or any other person involved in the contravention:

(a) recover an amount equal to three times the amount being the difference between the price at which the securities were disposed of, or agreed to be disposed of, by the insider or other person, and the price at which they would have been likely to have been disposed of at the time of the disposal or agreement, as the case may be, if the information had been generally available; and

(b) claim civil penalty in such amount as the Court considers appropriate having regard to the seriousness of the contravention, being an amount not more than RM1 million.

(7) An amount recovered or obtained by the Commission in an action pursuant to subsection (5) or (6), respectively, shall be applied:

(a) firstly, to reimburse the Commission for all costs of the investigation and proceedings in respect of the contravention or suspected contravention; and

(b) secondly:

(i) where it relates to subsection (5), to compensate the sellers who disposed of securities of the same class on the stock market of the stock exchange when information was not generally available between the time when the first contravention of subsection 89E(2) occurred and the time when information became generally available; and

(ii) where it relates to subsection (6), to compensate the buyers who acquired securities of the same class on the stock market of the stock exchange when the information was not generally available between the time when the first contravention of subsection 89E(2) occurred and the time when the information became generally available.

(8) If the Commission considers that it is not practicable to compensate the person referred to in paragraph (7)(b), in view of the likely administration costs, the amount of any potential distribution to each person and the difficulty of ascertaining or notifying the person whom it is appropriate to compensate, as the case may be, the Commission may decide not to distribute to the persons referred to in paragraph (7)(b).

(9) To the extent that any of the amount recovered or obtained in a civil action under subsection (5) or (6) has not been distributed pursuant to subsection (7), it shall be paid to the compensation fund maintained under Part VIII or retained by the Commission to defray the costs of regulating market trading, as the Commission, with the approval of the Minister, may determine.

(10) Any right of action that a person has by virtue of this section is in addition to any right that any other person has under any other written law.

[17] Based on the reading of ss. 89E(4), 90 and 90A, firstly, I find that these provisions applies to all persons who have contravened the provisions that relates to insider trading under the SIA. All these persons can be taken criminal action under s. 89E(4) or civil action under ss. 90 and 90A. These persons also can even be taken both criminal and civil action under the said provisions. As such, based on principle in *Datuk Harun*'s case *(supra)* and *Bird Dominic Jude v. PR* [2014] 4 CLJ 133; [2014] 3 MLJ 745, as the impugned sections apply to everybody that contravene the said law, it is not discriminatory in nature.

[18] It is also important to note here that the criminal proceedings under s. 89E(4) is exercisable by the Public Prosecutor whereas civil action under ss. 90 and 90A of the SIA is exercisable by the Security Commission. Here there are two different parties exercising two different powers with two different considerations in this matter. The Public Prosecutor will have to consider as to whether there is sufficient evidence to charge a person for criminal offence under s. 89E(4) whereas the Security Commission as required under the said law will have to consider whether it is in the public interest to take civil action against the person in breach of the impugned law.

[19] In this context, it is untenable to say that the powers or procedures in ss. 89E(4), ss. 90 and 90A exist side by side.

[20] As there are two parties with two different procedures in exercising their powers to commence the criminal or civil proceedings under the said provisions, there is no justification to contend of any discrimination. This is not a case where there are two set of procedures or rules to be considered by a same authority. In *Datuk Harun*'s case *(supra)* which quoted Khanna J in Indian Supreme Court case of *M Chhagganlal v. Greater Bombay Municipality* AIR 1974 SC 2009 has this to say:

> … I would, therefore, hold that the procedure envisage in the impugned provisions is not onerous and drastic as would justify an inference of discrimination. The simple fact that there are two forums with different procedures would not justify the quashing of the impugned provisions as being violative of Article 14, especially when both procedures are fair and in consonance with the principles of natural justice.

[21] Be that as it may, even if the powers or procedures in the said provisions exist side by side, this itself does not affect the validity of the law in question. The said law is still valid if there is a guideline in class of cases in which either procedure to be resorted to and the law in question contains provision for appeal. This has been explained by Suffian LP in *Datuk Harun*'s case *(supra)* as follows:

> Where there are two procedures existing side by side, the one that is more drastic and prejudicial is unconstitutional if there is in the law no guideline as to the class of cases in which either procedure is to be resorted to. But it is constitutional if the law contains provisions for appeal, so that a decision under it may be reviewed by a higher authority. The guideline may be found in the law itself; or it may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances, as well as from the provisions of the law itself. The fact that the executive may choose either procedure does not in itself the validity of the law. (Minority judgment in N.I. Caterers and judgment in M.Chhagganlal). We think that we should follow the same principle.

[22] The guideline for the classification as explained in *Datuk Harun*'s case may be found in the law itself, or may be inferred from the objects and reasons of the bill, the preamble and surrounding circumstances. As such it is not a requirement of the law to have a written guideline or policy like in the United Kingdom which has the *'Enforcement Guide of the Financial Conduct Authority Handbook of Rules and Guideline'* as pointed out by the applicant's counsel.

[23] In the present case, under s. 90A of the SIA, the important guideline before the Security Commission decides as to whether to take any civil action against a person in breach of the said law is to consider whether it is for the public interest to take the action to recover the sums as stated in s. 90A(5) or 90A(6) of the SIA.

[24] The guideline can also be inferred from the objectives of the impugned law which among others to recover the profit made by any person committing the offence of insider trading as can be seen in the Hansard of Parliament dated 17 December 1997 as follows:

> Dicadangkan juga bahawa seorang yang dibabitkan dengan kesalahan perdagangan dalaman itu hendaklah menyerahkan kembali keuntungannya itu. Peruntukan bagi meningkatkan penalti seperti yang terdapat di United States, Insider Trading Sanctions Act 1985 membolehkan security exchange commission memohon kepada mahkamah tiga kali ganda keuntungan atau kerugian yang dielakkan oleh seseorang yang membabitkan dengan kesalahan perdagangan dalaman.
>
> Sementara itu tindakan sivil hendaklah diperkenalkan dalam soal ini kerana darjah pembuktian adalah dihadkan kepada imbangan kebarangkalian sahaja, tidak seperti tindakan jenayah yang mempunyai darjah pembuktian yang tinggi iaitu melebihi keraguan yang munasabah atau beyond reasonable doubt. Selain daripada pembendungan kesalahan ini, melalui tindakan sivil salah satu dari objektif dalam memperkenalkan tindakan sivil ini ialah lebih ramai lagi yang akan mempunyai kepentingan untuk mengambil tindakan undang-undang atas kesalahan berkenaan dan tidak terhad kepada pendakwa raya sahaja. Tambahan pula dasar tindakan sivil membolehkan tuntutan ganti rugi yang penuh atau pampasan dibuat. Jadi, risiko kesalahan perdagangan dalaman bertambah dari setiap sudut.

[25] Apart from this, there is a right to appeal in relation to actions taken under ss. 89E(4), 90 and 90A of the SIA as provided under ss. 26, 28, 50 and 67 of the Courts of Judicature Act 1964.

[26] Therefore, the conditions as laid down in *Datuk Harun*'s case as mentioned earlier has been fulfilled and as such the existence of two procedures side by side in the present case, does not affect the validity of the law in question.

[27] Furthermore, under the doctrine of classification which has been accepted in our law as explained in *Datuk Harun*'s case *(supra)*, classification is permissible if it founded on an *intelligible differentia* and the *differentia* has a rational relation to the object sought to be achieved by the law in question.

[28] The meaning of intelligible differentia has been explained in *PP v. Harmenderpall Singh Jagara Singh* [2007] 2 CLJ 577; [2007] 3 MLJ 433 as follows:

> [62] Going by the Oxford English Dictionary, 'intelligible' means: capable of understanding (not by senses) that may be apprehended by intellect, and 'differentia'1 means: the attribute by which a species is distinguished from all other species of the same genus; a distinguishing mark or character. In this instance, the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may therefore be founded on a different basis, namely

A geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. The classification should never be arbitrary, *artificial or evasive.* It must rest always upon real and substantive distinction bearing a reasonable and just relation to the thing in respect to which the classification is made for otherwise the classification made would be B without any reasonable basis – Mukherjee J in *Anwar All Sarkar*'s case 1952 AIR 75 and quoted in *Public Prosecutor v. Si Liang KM* [1976] 2 MLJ 128 at p. 130.

[29] As to this doctrine of classification, in *Datuk Harun*'s case *(supra)*, Suffian LP has this to say:

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7. In India discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification, using the words used in the passage reproduced above from the judgment in Shri Ram Krishna Dalmia, provided that

D (i) the classification is founded on an intelligible *differentia* which distinguishes persons that are grouped together from others left out of the group; and

(ii) the *differentia* has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according E to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

The Solicitor-General submits that if the Indian doctrine of classification is to be accepted by our courts, which he argues has F not been done, it may be accepted subject to the modification that the courts should not take it upon itself to consider whether the classification is reasonable or not, a task which should be left to the legislature. In our opinion the doctrine of classification should be accepted by our courts, subject to what we said in paragraph 6 above. We adhere to what was said in *Public Prosecutor v. Khong Teng* G *Khen* at page 170.

[30] Therefore, even if the law in question can be considered as discriminatory, it is still a good law if it is based on reasonable or permissible classification.

H **[31]** Reverting back to the present application, the classification in the application of ss. 90 and 90A is clearly provided in the law itself that civil proceedings under these provisions will be taken where the Security Commission consider that it is in the public interest to take such action when there is a sum to be recovered against the person in breach of the law as laid down under s. 90A(5) and 90A(6) of the SIA.

I **[32]** It is also pertinent to note that the main objectives to take civil action against the person that breach the said law are to recover the profit made by the person who breached the said law, to curb the said offence, to allow more

party to take action against the person in breach of the law and to allow any claim for losses and damages. This objectives can be seen in the Hansard of Parliament dated 17 December 1997 as stated earlier.

[33] Therefore in the present case, there is a clear nexus between the classification and the object of the impugned law.

[34] On top of this, classification which is based on difference in circumstances of the case does not infringe art. 8(1) of the Federal Constitution. In this case, the decision to identify the difference in a particular case for criminal offence under s. 89E(4) is by the Public Prosecutor and for civil action under ss. 90 and 90A is by the Security Commission. A decision made which is based on the circumstances of a particular case such as in the present situation, is a reasonable classification.

[35] This principle of law can be seen in the case of *Nadarajah v. PP* [2000] 4 CLJ 634; [2000] 4 MLJ 373 at pp. 640-641 (CLJ); pp. 381-382 (MLJ) as follows:

> All that equality before the law requires is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration (see *Teh Cheng Poh v. PP* [1979] 1 MLJ 500. Thus as Lord Diplock said in *Ong Ah Chuan v. PP* [1981] 1 MLJ 64, art. 8(1) of the Constitution does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed. The decision to identify the difference in the circumstances of a particular case and to act accordingly is that of the Attorney General pursuant to art. 145(3) of the Constitution and is not subject to judicial review (see *Repco Holdings Bhd v. PP* [1997] 3 MLJ 681). In any event the exercise of the discretion by the Attorney General to institute a prosecution against a person in a certain court, dependent on the circumstances of that case, may itself amount to a reasonable classification for the purposes of art 8(1) of the Constitution. Cases such as *Ramkrishna Dalmia v. Tendolkar* [1959] SCR 279, *Govindlalji v. State of Rajasthan* [1964] 1 SCR 561, *State of J & K v. Golam Md* AIR 1967 SC 122, *Birakishore v. State of Orissa* (1964) 7 SCR 32, *Mittal v. Union of India* AIR 1983 SC I and *Lachman v. State of Punjab* AIR 1963 SC 222 support the proposition that a classification may be reasonable even though a single individual is treated as a class of himself, if there are some special circumstances or reasons applicable to him alone and not applicable to others. The objection grounded on art 8(1) of the Constitution cannot therefore be sustained.

[36] In the present case also, the applicants have failed to show any bias consideration by the authority or arbitrary, artificial or evasive classification in implementing the law in question.

[37] As such, based on the abovementioned reasons, I find the classification in the present case is reasonable and permissible.

[38] Therefore, s. 89E(4) does not infringe art. 8(1) of the Federal Constitution and the answer to the first question is in the negative.

Second Question

[39] As regards the second question, the issue is whether s. 89 of the SIA infringes art. 5(1) of the Federal Constitution as the definition of information which includes "matters relating to the future" is vague and uncertain.

[40] Section 89 read as follows:

> Information
>
> For the purposes of this Division, 'information' includes:
>
> (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public;
>
> (b) matters relating to the intentions, or likely intentions, of a person;
>
> (c) matters relating to negotiations or proposals with respect to:
>
> (i) commercial dealings; or
>
> (ii) dealing in securities;
>
> (d) information relating to the financial performance of a corporation;
>
> (e) information that a person proposes to enter into, or has previously entered into one or more transactions or agreements in relation to securities or has prepared or proposes to issue a statement relating to such securities; and
>
> (f) matters relating to the future.

[41] Article 5 of the Federal Constitution read as follows:

> (1) No person shall be deprived of his life or personal liberty save in accordance with the law.

[42] As regards this issue, s. 89 is relevant to establish the offence of insider trading under s. 89E(4) of the SIA. Section 89E(1)(a) and (b) laid down that a person is an insider if that person possesses, knows or ought reasonably to know the information is not generally available.

Here s. 89 set out the categories of information at paras. (a) to (f) for the purpose to determine as to whether a person is an 'insider' under s. 89E(1).

In this context, it is the duty of the prosecution to establish that the information possesses, knows or ought reasonably to know by a person falls under either one of para. (a) to (f) before the person can be considered as an 'insider' and eventually for criminal action to be taken under s. 89E(4). The categories of information includes para. (g) 'matters relating to the future'.

[43] It is not for me to speculate what is 'matters relating to the future' in para. (f). The important issue here is that I find the wordings or sentence in this paragraph (f) is plain and unambiguous. As to whether the words 'matters relating to the future' is too wide in its application and uncertain as argued by the applicants' counsels are matters to be debated in Parliament and not for this court to determine. The duty of the court is to implement the law as explained by Lord Diplock in the case of *Duport Steels Ltd v. Sirs* [1980] 1 All ER 529 and quoted with approval in the Federal Court case of *PP v. Shihabduin Hj Salleh & Anor* [1980] 1 LNS 223; [1980] 2 MLJ 273 as follows:

> the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.

[44] In the same case, Lord Scarman has this to say:

> … in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law [and] the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires.

[45] Likewise in the case of *Loh Koh Choo v. Government of Malaysia* [1977] 2 MLJ 187, where Raja Azlan Shah (as he then was) said this:

> the duty of the court is to implement the law. Whether it is harsh or unjust is to be debated in Parliament.

[46] Therefore, having analysed the provision of s. 89 and the argument put forth by counsel for the applicants, it has not been established that s. 89 infringes art. 5(1) of the Federal Constitution.

[47] As such, the answer to the second question is also in the negative. Section 89 of the SIA is constitutional.